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No. 86-671

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALICE G. UTSEY, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the court of appeals erred in affirming the district court's dismissal of her untimely Title VII action on the ground that equitable tolling was inapplicable on the facts of the case.

1. Petitioner, a black woman, worked as a civilian clerk-typist for the United States Army in West Germany. Her work performance proved unsatisfactory and her employment was terminated in February 1983 (Pet. App. A1 at 2).[1] Petitioner filed an Equal Employment Opportunity claim with the Army, asserting that her supervisors terminated her employment on account of her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Army rejected her claim, and petitioner received notice of the Army's final decision on February 8, 1985 (Pet. App. A1, at 3).

The statutory provisions and regulations applicable to federal government employees presented petitioner with a number of options for further review of her discrimination

[1] Petitioner requested permission to resign in lieu of being fired and that request was granted (Pet. App. A1, at 2).

claim. First, she could appeal the Army's decision to the Equal Employment Opportunity Commission (EEOC). 29 C.F.R. 1613.231. Under that option, she was required to file a notice of appeal with the EEOC within 20 days after receiving notice of the Army's decision. 29 C.F.R. 1613.233(a). Second, she could file a civil action in federal district court (1) within 30 days after receiving notice of the Army's final decision; (2) within 30 days after a final decision of the EEOC; or (3) at least 180 days after filing an appeal to the EEOC, if the EEOC had not issued a decision. 42 U.S.C. 2000e-16(c); 29 C.F.R. 1613.281. Petitioner sought further administrative and judicial review of her discrimination claim, but failed to initiate review in a timely fashion. She filed a notice of appeal with the EEOC on March 11, 1985 (Pet. App. A1, at 3), 10 days after the 20-day filing period had lapsed. She filed a civil action in the district court on May 14, 1985 (*ibid.*), more than two months after the initial 30-day time period had lapsed.

On July 10, 1985, the EEOC dismissed her appeal as untimely (Pet. App. A1, at 3). Petitioner then argued that her pending district court suit could be treated as a timely civil action filed within 30 days after the EEOC's final action, even though the civil action was filed long before the EEOC issued its decision. Petitioner argued in the alternative that even if her suit was untimely, the time limits are not jurisdictional, and are subject to equitable tolling under this Court's ruling in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982).[2]

The district court rejected petitioner's contentions and granted the Army's motion to dismiss the action without discussing the issue of equitable tolling (Pet. App. A2, at

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[2] In *Zipes*, a case involving a private employer, this Court ruled that the 180-day provision in 42 U.S.C. 2000e-5(e) limiting the time for filing charges with the EEOC was not a jurisdictional prerequisite to suit in federal court. 455 U.S. at 393.

5-12). The court of appeals affirmed in an unpublished opinion (Pet. App. A1). It observed (*id.* at 6) that petitioner had failed to file her district court suit within 30 days after receiving notice of the Army's decision, as required under 49 U.S.C. 2000e-16(c) and 29 C.F.R. 1613.281(a). Assuming without deciding that the EEOC's dismissal of her appeal for untimeliness was "final action" that could trigger a renewed opportunity to pursue a district court action, the court determined that the action was nonetheless untimely because it was filed before the EEOC issued its decision and less than 180 days after petitioner filed her claim with the EEOC (Pet. App. A1, at 6-9). See 49 U.S.C. 2000e-16(c); 29 C.F.R. 1613.281(c) and (d). The court concluded that it was unnecessary to determine whether these time limits are jurisdictional, holding that even if the time limits are not jurisdictional, the facts of petitioner's case do not provide a basis for equitable tolling (Pet. App. A1, at 9-13).[3]

2. Petitioner asks this Court to resolve two broad questions: (1) whether the time limits applicable to petitioner's civil action are jurisdictional; and (2) if the time limits are not jurisdictional, whether a Title VII plaintiff may invoke equitable tolling principles to preserve a claim against the federal government (Pet. 1-2). As the court of appeals held (Pet. App. A1, at 11), however, neither of these questions need be reached here. Even if one assumes that the time limits are not jurisdictional, the doctrine of equitable tolling would be inapplicable under the facts of this case. See *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984) (per curiam).

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[3] The court of appeals relied on this Court's decision in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984) (per curiam). In *Baldwin*, the Court concluded that a Title VII plaintiff who had failed to file a district court complaint within 90 days after the EEOC's issuance of a right-to-sue letter was not entitled to equitable tolling of the statutory time limit. 466 U.S. at 150-151.

The court of appeals was clearly correct in holding that equitable tolling is inapplicable here. The Army decision rejecting petitioner's charge of discrimination was accompanied by a standard notice, required by federal regulations (29 C.F.R. 1613.282), providing petitioner with a clear and unambiguous explanation of the time limits governing EEOC and judicial review (Pet. App. A5, at 3-7). Petitioner contends that the time period nevertheless should be tolled because she had difficulty in understanding that standard notice (Pet. App. A1, at 12). That contention does not provide a sufficient basis, even in cases involving private defendants, for tolling congressionally prescribed time limits. Equitable tolling is generally reserved for those instances where the notice is defective or where the plaintiff has been misled through some affirmative misconduct by the defendant. See *Baldwin,* 466 U.S. at 151.[4]

The court of appeals' decision here simply follows this Court's admonition in *Baldwin* (466 U.S. at 152):

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco* v. *Silver,* 447 U.S. 807, 826 (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

In all events, the court of appeals' determination that equitable tolling is inapplicable in this case presents a nar-

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[4] As the court of appeals noted (Pet. App. A1, at 12), petitioner's justification for equitable tolling also conflicts with her argument on the merits that she was fired because of her race and not because of her poor language skills.

row, fact-bound question that does not warrant this Court's review.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[5] This Court denied a petition for a writ of certiorari in a case raising the same jurisdictional issue that petitioner seeks to raise here. *Stuckett* v. *United States Postal Service*, 469 U.S. 898 (1984). The dissenting opinion noted that the courts of appeals are not in accord as to whether the various time limits for filing actions under Title VII are jurisdictional. *Ibid.* (White, J., dissenting) (listing cases). The dissenting opinion also observed, however, that the jurisdictional issue was squarely presented because "[w]hether tolling would be appropriate in this case if the time limit is not jurisdictional was neither argued nor presented below."

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